# STATE OF MICHIGAN

# COURT OF APPEALS

RAYMOND MURRAY,

Plaintiff-Appellant,

v

SEARS, ROEBUCK & CO.,

Defendant-Appellee.

UNPUBLISHED
February 19, 1999

No. 205831
Oakland Circuit Court
LC No. 96-516137 NO

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of no cause of action, which was entered upon the jury's verdict in favor of defendant. We affirm.

Plaintiff was injured when he fell in defendant's store. He claimed to have fallen over a board or other piece of wood that was left in the aisle. His medical records, however, evidenced that he believed he tripped over a display platform while he was walking with his arms full of clothing. There were no eyewitnesses to the accident.

I

On appeal, plaintiff argues that reversal is required because the trial court permitted Susan Albert, defendant's insurer's claims investigator, to testify even though she was not included on defendant's witness list. We disagree.

Whether to allow an undisclosed witness to testify is a matter within the trial court's discretion. *Pastrick v General Telephone Co of Michigan*, 162 Mich App 243, 245; 412 NW2d 279 (1987). Trial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses. *Id.* In the present case, plaintiff admitted that he discussed his accident with somebody shortly after the fall, but denied describing to that person how the

fall occurred. It was not an abuse of discretion for the trial court to permit Albert to rebut plaintiff's testimony.

II

Defendant also argues that the trial court erred in admitting into evidence a transcript of Albert's tape-recorded conversation with plaintiff. We review challenges to evidentiary rulings for an abuse of discretion. *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996).

We agree with plaintiff that the admission of the transcript violated the best evidence rule, and further find that, in the absence of testimony that the transcript accurately reflected the conversation between Albert and plaintiff, the transcript was not properly authenticated. MRE 901(a).[1] However, this does not end our inquiry.

It is well settled that an error in the admission of evidence is not a ground for vacating, modifying or otherwise disturbing a judgment unless refusal to do so would be inconsistent with substantial justice. MCR 2.613(A); *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997). We find no such error here. Plaintiff's own medical records indicate that he reported he had fallen on a platform, not a board as plaintiff maintained at trial. Further, we agree with defendant that "plaintiff's prolonged failure to seek medical attention for the thumb dislocation he claimed was caused by his fall at Sears may have caused the jury to question the credibility of plaintiff's entire testimony."

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] Because we find that the threshold requirement of authentication was not established, we need not address plaintiff's argument that the transcript was hearsay. See *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995).